Supreme Court, U.S.
FILED
MAR 25 1999
CLERK

(4)

No. 98-1327

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

SUSAN OYGARD and NORVALD OYGARD,
Petitioners,

v.

TOWN OF COVENTRY, COVENTRY TOWN COUNCIL,
JOAN LEWIS, JOHN ELSESSER,
RICHARD ASHLEY, ALAN KOEPKE
Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Second Circuit

REPLY
TO RESPONDENTS' BRIEFS IN OPPOSITION

Susan Oygard, *pro se*
Norvald Oygard, *pro se*
235 North School Road
P.O. Box 62
Coventry, CT 06238
860-742-5209

8 pp

Petitioners reply to the following points raised by respondents in their briefs:

1. Municipal respondents brief in opposition pg. 3:

> *The lack of clarity stems from the facts that the District Court's Order granting summary judgment could arguably have extended to the defendant's counterclaim..*

The lack of clarity is precisely the problem. It is not inconceivable that municipal respondents will argue during remand proceedings in state court, as they did in their Appellate Court brief,[1] that the District Court's Order granting summary judgment extended to the counterclaim.

Petitioners have more than an idle interest in knowing whether or not summary judgment has been entered against them on the counterclaim. Leaving the matter unresolved by declaring it unclear is a departure from the accepted and usual course of judicial proceedings.

2. Municipal respondents' brief in opposition pg. 4:

> *There is little question, however that the District Court focused on the plaintiffs' amended complaint dated October 30, 1996.*

No one reading the District Court's recitation of facts in its ruling (Oygard App. pgs 2-3) would have any idea that the Town was involved in Koepke's illegal activities in any way. Every detail that points to state action is inexplicably

---

[1]See municipal defendants' brief in *Oygard v. Town of Coventry* No. 98-7578, pgs 34-36.

left out of the District Court's ruling. Due process under Conn. Gen. Stats. § 8-7 and § 8-8 is not addressed.

The fact that *both* of the lower court opinions are unpublished should be a red flag to this Court. Chief Judge Posner of the Court of Appeals for the Seventh Circuit was recently quoted on the front page of the New York Times as saying that the tendency of federal appellate courts to issue unpublished opinions "is sort of a formula for irresponsibility.... Most judges, myself included, are not nearly as careful in dealing with unpublished decisions."[2]

3. Municipal respondents brief in opposition pg. 8:

> *Not only did the plaintiffs' take full advantage of their opportunity to be heard, but they succeeded when they did so.*

Petitioners' succeeded only in the sense that the Walzes succeeded in obtaining a permit to connect to the public water service in *Walz v. Town of Smithtown* 46 F.3d 162 (2d Cir.1995), cited by municipal respondents in their brief on page 7.

The Walzes lived on a narrow unpaved road in Smithtown, N.Y. When their well went dry, they applied to the local Highway Department for a permit to connect to the public water service. The Superintendent of Highways, refused to issue the permit unless the Walzes conveyed a fifteen foot wide strip of land to the Town so that the Town could improve the road. The Walzes refused to give up their land to obtain water services. Litigation ensued which resulted in a court order to the Superintendent of Highways to issue a permit. A permit was then issued but with several

---

[2]See Sunday March 14, 1999 New York Times, page 1 'Caseload Forces Two-Level System for Appeals Courts'

unusual conditions attached. The Walzes thereupon filed a motion to hold the Superintendent of Highways in contempt. Only then, after they filed a motion for contempt, did the Walzes succeed in obtaining a permit for the standard fee.

Likewise, petitioners 'succeeded' in their zoning appeal only after the municipal respondents were personally served with the summons and complaint in the case at bar. The Coventry Town Council, like the Yonkers City Council in *Spallone v. U.S.* 487 U.S.1251 (1988), acted as if legal proceedings were irrelevant, until its members found themselves personally involved in the litigation.

4. Municipal respondents brief in opposition pg. 5:

> *In the present case, the Oygards' appeal pursuant to § 8-7 was from "any other order" and stayed "all proceedings in the action appealed from." However, "proceedings" refers to legal enforcement proceedings. State v. Magnotta, 1 Conn. Cir. 151, 172 A.2d 515 (1961)*

State v. Magnota, a 1961 Connecticut superior court decision, was overruled by the Connecticut legislature in 1977 with the passage of Public Act 77-509, which amended the 'stay' language of the statute to its present form. Senate Bill 597, which was enacted as P.A. 77-509 § 6, was entitled AN ACT CONCERNING THE STAYING OF CONSTRUCTION PENDING A ZONING APPEAL. See discussion in Plaintiffs' motion for summary judgment, Oygard App. pgs 83-86.

5. Municipal respondents brief in opposition pg. 10:

> *Even if one were to assume all of the Oygards' allegations to be true, the municipal defendants' intentions would have been to work with Koepke to*

secure advantageous radio communications service, but could never be construed to be an intention to harm the Oygards.

Municipal respondents confuse motive with intent. Like the Superintendent of Highways in *Walz v. Town of Smithtown, supra* whose motive, in all likelihood, was to improve a town road and not to harm the Walzes, municipal respondents are not absolved of liability by claiming that their motive was to secure advantageous radio communications service.

6. Municipal respondents brief in opposition pg. 9:

The Oygards' equal protection claim ... [challenges] ... the purported "selective enforcement" of the zoning statutes.

The Oygards' equal protection claim is that they were denied equal protection when the respondents conspired to violate Conn. Gen. Stats. § 8-7 and § 8-8 and the Coventry Zoning Regulations. All co-conspirators are jointly and severally liable for the acts of each of the conspirators in furtherance of the conspiracy. See 16 Am. Jur.2d § 16:

> Each act done in pursuance of the conspiracy by one of several conspirators is, in contemplation of law, an act for which each is jointly and severally liable. This joint and several liability of a conspirator applies to damages accruing prior to his joining the conspiracy, as well as damages thereafter resulting, and regardless of whether he took a prominent or inconspicuous part in the execution of the conspiracy. This liability of each member of a conspiracy for the damage resulting therefrom exists whether or not the conspirator profited from the result of the conspiracy.

7. Municipal respondents brief in opposition pg. 2:

> *The respondents specifically deny petitioners' statement on page 6 of the petition that co-defendant Koepke constructed his radio tower 'with the cooperation of the Coventry Building Inspector.'*

The record supports petitioners' statement. See Koepke Deposition pg. 14 (Plaintiffs' Motion for Summary Judgment Exhibit 1):

***

Q. Isn't it true that on August 19th of 1986, you received a certified letter dated August 18th, 1986, from Zoning Agent Robert Isner stating that an appeal of his decision to issue a zoning permit for a radio tower had been filed on August 12th of 1986?

A. To the best of my recollection, I did receive a letter.

Q. Isn't it true that the August 18th, 1986 letter from Robert Isner advised you that a public hearing would be held on September 16th, 1986?

A. I believe it did.

Q. After you received notice that an appeal had been filed, did any local government official encourage you to go forward with construction?

[question repeated]

A. Yes.

Q. And who was that?

A. Mr. Broderson and Mr. Willnauer.

Q. And do you know what Mr. Willnauer's position was within the government?

A. Well, to my recollection, at that time he was the Sanitarian, the Building Official, and Assistant Zoning Agent.

***

There is other evidence in the record as well. See Koepke Deposition, deposition exhibit 5 ¶25: "On August 21, 1986, Koepke called the Coventry Building Department for permission to pour concrete for the proposed building. This permission was granted by Al Broderson [assistant building inspector]."; and deposition exhibit 12 ¶ 24: "On or about September 9, 1986, Alan Broderson, the building official, conducted the final electrical inspection for the connection of the public utilities to the building."

Municipal respondents produced no rebuttle evidence whatsoever. Until now, they did not even deny that Koepke constructed his tower with the cooperation of the Coventry building inspector.

8. Respondent Koepke's brief in opposition pg. 3:

> *In fact, Koepke provided free antenna space to all of the ten municipalities which utilized his four towers in eastern Connecticut.*

First of all, Koepke's customary business practices do not preempt state regulatory statutes governing zoning appeals. Second, even if true, Koepke's activities in other towns is irrelevant. There is nothing in petitioners' complaint about any town other than Coventry. If he is, or was, doing in other towns what he did in Coventry, that is all the more reason to grant the petition for certiorari because it reinforces petitioners' argument that the issues raised in this case have implications beyond the Town of Coventry.

9. Respondent Koepke's brief in opposition pg. 6:

> *These are issues not raised by the Oygards in either their amended complaint or their summary*

> *judgment motion. Thus, such claims cannot be raised for the first time before this Court.*

Each of the questions presented for review before this Court was presented to the Court of Appeals. See petitioners' Appellate Court brief, Oygard App. pgs. 119 et seq.

Moreover, the arguments raised in support of the petition for writ of certiorari were also raised in the courts below. See e.g. Plaintiffs objection to municipal defendants' Rule 12(b)(6) motion, pg. 15: "Bribe receiving is a felony that qualifies as a fundamental procedural irregularity giving rise to a substantive due process claim." See also Plaintiffs' Appellate Court reply brief pg. 8: "Obstructing justice by undermining the defense of the Zoning Board of Appeals during the course of a nine year administrative appeals process is a substantive due process violation." See also plaintiffs' equal protection argument in their motion for summary judgment citing Justice Brennen's concurring opinion in Heckler v. Chaney: (Oygard App. pg. 92)

> [T]he Court properly does not decide today that nonenforcement decisions are unreviewable in cases where ... [such decisions are] made for entirely illegitimate reasons, for example, nonenforcement in return for a bribe, judicial review of which would not be forclosed by the nonreviewability presumption.

CONCLUSION

Certiorari should be granted.

Susan Oygard, *pro se*
Norvald Oygard, *pro se*
235 North School Road
P.O. Box 62
Coventry, CT 06238
(860) 742-5209